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Before the
Federal Communications Commission FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC OFFICE OF SECRETARY

In the Matter of) MM Docket No. 94-155
)
 Amendment of Section 73.202(b)) RM-8803
 Table of Allotments)
 FM Broadcast Stations)
 (Tice, Estero, Big Pine Key, Key)
 Colony Beach, and Naples, Florida) DOCKET FILE COPY ORIGINAL

To: Chief, Allocations Branch

REPLY COMMENTS

WSUV, Inc. ("WSUV"), licensee of Station WJST(FM) (formerly Station WROC, which are the call letters referred to in the Commission's *Public Notice*), Fort Myers Villas, Florida, by its attorney, hereby submits Reply Comments in the above-referenced proceeding. With respect thereto, the following is stated:

Background

1. The major pleadings and proposals filed in this proceeding can be summarized as follows:

<u>Community</u>	<u>Present</u>	<u>Gulf</u> <u>I</u>	<u>Gulf</u> <u>II</u>	<u>Palmer</u>	<u>Counter-</u> <u>proposal</u>	<u>Gulf</u> <u>III</u>	<u>Joint</u> <u>Res.</u>	<u>Revised</u> <u>Jt. Res.</u>
Indiantown	276C2				276C1		276C1	276C1
Naples (WNOG)	228A	284A	284A	Oppose	--		292A	228A
Naples (WSGL)	276C3				284C3		284C3	284C3
Big Pine Key	284C	283C	283C		281C		281C	281C1
Key Colony Beach	280C2	237C2	267C2		267C2		267C2	267C2
Ft. Myers Villas	292A				292C2		275C2	275C2
Clewiston	292A				258C3		258C3	258C3
Jupiter	258A				292C3		292C3	292C3
Tice	229A	229C2	229C2		--		--	292C2
Estero	--					229C2	222C2	--
Avon Park	292A				256A			

In general, as reflected above, this proceeding began with a proposal filed by Gulf Communications Partnership ("Gulf") to upgrade the permit for Station WAAD, Tice, Florida,

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from Channel 229A to Channel 229C2 ("Gulf I", above). Gulf's first Petition for Rule Making was dismissed. Gulf subsequently filed a revised request for rulemaking ("Gulf II" above), again seeking an upgrade for Channel 229A, Tice, Florida. That proposal ultimately was the subject of a *Notice of Proposed Rule Making and Order to Show Cause*, DA 94-1501 (Dec. 27, 1994) ("NPRM", above), which led to the filing of an opposition to the proposal by The Palmer Broadcast Group ("Palmer"), objecting to the proposed move of Station WNOG-FM, Naples, Florida, from Channel 228A to Channel 284A, and the filing of "Joint Comments and Counterproposal" ("Counterproposal," above) by the Amaturio Group, Ltd. ("Amaturio"), licensee of Station WPBZ(FM), Indiantown, Florida; WSUV, Inc. ("WSUV"), licensee of the Station now known as Station WJST, Ft. Myers Villas, Florida; GGG Broadcasting, Inc. ("GGG"), permittee of Station WJBW(FM), Jupiter, Florida; and Glades Media Company ("Glades"), licensee of Station WAFC-FM, Clewiston, Florida (the "Counterproponents"). The goal of the counterproposal filed by the Counterproponents predominantly was to secure an upgrade of Station WPBZ(FM) from Channel 276C2 to Channel 276C1; an upgrade of Station WJST(FM) from Channel 292A to Channel 292C2; an upgrade of Station WAFC-FM from Channel 292A to Channel 258C3; and an upgrade of Station WJBW(FM) from Channel 258A to Channel 292C3. In the meantime, Gulf proposed to reallocate Station WAAD(FM) from Tice to Estero, and responded to Palmer's objections to the proposed modification of Station WNOG-FM from Channel 228A to Channel 284A.

2. Gulf's proposal and the Counterproponents' counterproposal were mutually exclusive. A Joint Resolution initially was agreed to by Gulf and all of the Counterproponents ("Joint Res.", above). Subsequently, a "Supplement to Joint Reply Comments Mooting Sole Objection to Joint Resolution" ("Supplement") was filed by Palm Beach Radio Broadcasting, Inc. ("Palm

Beach Radio"), the successor licensee of WPBZ(FM), Indiantown, Florida, and Gulf, requesting modification of the Joint Resolution ("Revised Jt. Res.," above). The proposal contained in that Supplement was placed on Public Notice, Report No. 2134, on May 24, 1996, treating the Supplement as a Counterproposal, and inviting the filing of Reply Comments no later than fifteen days from the date of the Public Notice.

3. The Supplement holds itself out to be a "global solution" to the mutually-exclusive allotment proposals in this proceeding. Supplement at 2. The Supplement is not a global solution. The Supplement was filed without WSUV's consultation, consent, or knowledge. As noted above, the Supplement was filed only on behalf of the Gulf, permittee of Station WAAD(FM), Tice, and Palm Beach Radio, licensee of Station WPBZ(FM), Indiantown. For the reasons stated below, WSUV strongly opposes adoption of the Revised Joint Resolution proposed in the Supplement.

Discussion

4. In its barest essence, the Supplement reflects a deal apparently concocted between Palm Beach Radio and Gulf to attempt to eliminate the opportunity for WSUV to upgrade on its own current channel of operation, and instead provide the future ability to operate on Channel 292 (as a C2 facility) to Station WAAD, a station due to commence operation in the same market as WSUV at some point in the future. The plan apparently was devised in order to obtain Gulf's concurrence to drop the remainder of its proposal which was at odds with the ability of Palm Beach Radio to achieve an immediate upgrade of its facility to Class C1 status.

5. The Supplement claims:

The modification of [of Channel 292C2 at Tice, Florida for Channel 229C2] became technically possible only in the last few weeks as a result of Commission Rulemaking Actions in MM Docket Nos. 89-455 and 92-125.

That statement is not literally true -- the proposal first became "technically possible" as a result of prior Commission's actions, *e.g.*, in Dockets Nos. 87-455, 89-455, and 92-155, and Perry, FL, 4 FCC Rcd 5599 (Chief, Policy and Rules Div. 1989), *recon. granted in part*, 7 FCC Rcd 2557, 2558 (Deputy Chief, Policy and Rules Div. 1992) (substituting Channel 293A for Channel 292A at Sarasota, Florida and Channel 256A at Avon Park, and modifying the licenses of WSRZ(FM) and WWOJ(FM) accordingly). As a result, WSUV proposed upgrading its facility utilizing "Channel 292C2" in the *same* manner as is now being proposed by Gulf on the original deadline date for Comments in this proceeding, over a year prior to the filing of Gulf's Supplement. Gulf's latest claim, however, does contain an element of truth -- now that Avon Park proceeding has concluded and Avon Park has affirmatively been ordered off of Channel 292A to Channel 292C3 as a result of Murdock and Avon Park, FL, DA 96-237 (March 7, 1996), all uncertainty concerning the status of that channel move has been eliminated, and any upgrade on WSUV's operating channel, Channel 292C2, can be accomplished more easily and quickly.

6. But most importantly, WSUV already operates on Channel 292, and WSUV timely expressed an interest in upgrading and maintaining operations on that channel, consistent with Section 1.420(g)(3) of the Commission's co and adjacent channel upgrade rules. 47 C.F.R. § 1.420(g)(3). Now that the Avon Park hurdle has been removed, however, Gulf, an unbuilt permittee, seeks to come forward, remove WSUV from its own current channel of operation, which would require a site change, unnecessarily move WSUV to a different C2 channel, and allow Gulf (WAAD) to commence operations *in the same market as WSUV* and use Channel 292C2, itself. For the reasons stated below, WSUV objects to this channel grab.

7. WSUV has operated on Channel 292 since August 16, 1993, initially under a time

brokerage agreement until April 22, 1994, and subsequently, as licensee of the facility. WSUV has spent tens of thousands of dollars developing the facility on this frequency.

8. Any frequency change at this stage would involve confusion to the public of the sort recognized to exist by the Commission. Columbus, Central City, Crookston, Kearney, Lexington, McCook, and Ventine, Nebraska, 59 R.R. 1184 (1986). As the Commission noted in that case:

there can...be a significant amount of confusion to the public from stations changing frequencies. Even though stations do attempt to inform the public of their change in frequency, these efforts are not often immediately successful and can result in disruptions to listening and viewing habits and losses of audience...Further, changing a station's frequency is a significant action which would cause significant disruptions to a station's business. Modifications to equipment and promotional literature pertaining to the operating frequency are of major concern to most licensees....

Id. at 1185 ¶ 4.

9. The proposed channel change of Station WJST to accommodate the specific proposed channel upgrade of WAAD in this case is wholly unnecessary. Fort Myers Villas and Tice both will operate in the Fort Myers area. Both of the possible C2 channels, 275C2 and 292C2, can provide 100% city-grade coverage to either Fort Myers Villas or Tice from the channels' proposed reference sites. Thus, without changing any other aspects of the Revised Joint Resolution, WJST, an operating station, can be upgraded simply from Channel 292A to Channel 292C2 (a co-channel upgrade fully in accord with 47 C.F.R. § 1.420(g)(3)), as originally proposed¹, instead of Channel 275C2, and conversely, Channel 275C2 can be allotted to Tice

¹ The proposed reference coordinates of Channel 292C2 are 26-29-24 N, 81-50-08 W. WSUV will accept these coordinates for the Commission's convenience. However, to help eliminate the likelihood of frivolous attacks on the proposal by opponents claiming lack of a buildable tower site, WSUV prefers the adoption of 26-19-00 N, 81-47-13 W as the coordinates for Channel 292C2, Fort Myers Villas, which is the site of an existing tower.

for use by WAAD as the initial operation of its new facility.

10. The one key difference between the two channels lies in available transmitter sites. Channel 292C2 can be allotted to Fort Myers Villas to a site less than 3 km from WJST's present authorized tower, and the actual upgraded WJST facility could be built at WJST's present site under the Commission "contour protection" rules, 47 C.F.R. § 73.215. In contrast, a transmitting facility for Channel 275C2 cannot be allocated or built at WJST's existing site in compliance with the Commission's Rules; it can, however, be allocated to the *same* reference coordinates as currently proposed for the channel by Palm Beach Radio and Gulf, but be assigned to provide service to Tice.

11. As the Commission has stated:

We will not require an existing licensee or permittee to change its authorized transmitter site to accommodate a proposal or application without the consent of the licensee or permittee. See , e.g., Claremore, OK, 3 FCC Rcd 4037 (1988).

Rocky Mount, NC, 8 FCC Rcd 6206 (Chief, Policy and Rules Div. 1993). While it is true that WSUV consented to its possible operation on Channel 275C2, that proposal was acceptable to WSUV only to the extent it would permit consideration of the re-allotment of Channel 292A to either Palm River, Florida² or Naples, Florida,³ communities which are 20-30 miles south of Fort Myers Villas in a separate county. Adoption either of those proposals would not have resulted in any new, immediate operation on Channel 292 in the market area served by WSUV that would create audience confusion disfavored by the Commission, and also would not have involved total supplantation of WSUV's original C2 proposal (including conceivably its existing transmitter site) by an area competitor. For this reason, WSUV unequivocally at this time

² See Joint Comments and Counterproposal dated February 17, 1995 at 4.

³ Joint Reply Comments at 5.

revokes its consent to any Gulf proposal that would require WSUV to change transmitter sites, and hereby states that it does not agree to change transmitter site to allow operation on Channel 275C2.

12. The Commission's duty and obligation therefore is clear: first, WJST is entitled generally, where it is technically feasible, to obtain a protected upgrade on its own channel pursuant to the Commission's Rules (see 47 C.F.R. § 1.420(g)(3)); second, the Commission recognizes that the availability of a co-channel is dependent on the consent of the station already operating on the frequency (see FM Channel Upgrading, 60 R.R.2d 114, 120 (1986)); third, the Commission has determined that it is in the public interest to avoid audience confusion and disruption as would occur through approval of unnecessary channel changes (see Columbus, Central City, Nebraska, et al., supra.); fourth, Channel 275C2 can instead be allotted to Tice in full accord with the Commission's allocation rules, and since Station WAAD is not yet an operating facility, no disruption will be created by the move; fifth, the Commission retains the right to substitute channels in rule making proceedings where necessary to accommodate its rules and policies; and sixth, the Commission *must* exercise that authority in this case, since WSUV will not agree to change its transmitter site to allow an operation on Channel 275C2 in favor of Station WAAD.

13. Based upon the foregoing principles, it should be clear that precedent and the public interest is best served by leaving existing stations on their present frequencies wherever possible, and Commission precedent is served by not requiring forced channel moves off of existing frequencies and from present transmitter locations. Here, there is no *public* benefit -- the only "benefit" would only be to a future area competitor/permittee who wants to take the frequency of an existing operating station.

14. Therefore, initially, WSUV requests that the following proposed changes be made to the FM Table of Allotments:

UNIVERSAL CHANGES

<u>Community</u>	<u>Station</u>	<u>From</u>	<u>To</u>
Fort Myers Villas	WJST	292A	<u>292C2</u>
Clewiston	WAFC	292A	258C3
Jupiter	WJBW	258A	292C3

The licensees in the above communities have already all agreed to and have agreed to the above changes in this Docket.

15. Next, since Gulf, the permittee in Tice, has expressed an interest in upgrading its Class A facility to Class C2, WSUV hereby provides two ways in which such an upgrade could be accomplished.

16. First, the following alternative would allow WAAD and upgrade on Channel 275C2, the channel it knows is available and wish it wishes to require WJST to move to:

ALTERNATIVE A

<u>Community</u>	<u>Station</u>	<u>From</u>	<u>To</u>
Indiantown	WPBZ	276C2	276C1
Naples	WSGL	276C3	284C3
Big Pine Key	WWUS	284C	281C1
Key Colony Beach	WKKB-CP	280C2	267C2
Tice	WAAD-CP	229A	<u>275C2</u>

along with the universal changes proposed above:

Fort Myers Villas	WJST	292A	<u>292C2</u>
Clewiston	WAFC	292A	258C3
Jupiter	WJBW	258A	292C3

Adoption of this Alternative would allow for *two* upgrades from Class A to Class C2 (at Fort Myers Villas and Tice), *two* upgrades from Class A to Class C3 (at Clewiston and Jupiter), and

one upgrade from Class C2 to Class C1 (at Indiantown). Alternative A is in compliance with the "Columbus Doctrine" in that all existing stations have consented to the above changes except for Station WSGL in Naples, but that channel change will not require a change in transmitter sites. WAAD-CP in Tice and WKKB-CP in Key Colony Beach are unbuilt and do not count for purposes of the Columbus Doctrine.

17. Alternatively, if the Commission prefers, the Commission could upgrade the construction permit for Station WAAD, Tice, Florida, as originally proposed in this Docket on Channel 229C2 utilizing the following Alternative B:

ALTERNATIVE B

<u>Community</u>	<u>Station</u>	<u>From</u>	<u>To</u>
Indiantown	WPBZ	276C2	276C2 (no change)
Naples	WSGL	276C3	276C3 (no change)
Big Pine Key	WWUS	284C	283C
Key Colony Beach	WKKB-CP	280C2	267C2
Tice	WAAD-CP	229A	<u>229C2</u>
Naples	WNOG	228A	<u>284A</u>

along with the universal changes proposed above:

Fort Myers Villas	WJST	292A	<u>292C2</u>
Clewiston	WAFC	292A	258C3
Jupiter	WJBW	258A	292C3

Adoption of this Alternative would allow for *two* upgrades from Class A to Class C2 (at Fort Myers Villas and Tice), *two* upgrades from Class A to Class C3 (at Clewiston and Jupiter). Alternative B is in compliance with the "Columbus Doctrine" in that all existing stations have consented to the above changes except for Station WNOG in Naples, but that channel change will not require a change in transmitter sites. WAAD-CP in Tice and WKKB-CP in Key Colony

Beach are unbuilt and do not count for purposes of the Columbus Doctrine.⁴

18. WSUV does not take a position between Alternative A, which provides for upgrades at Tice and Indiantown (together with upgrades for Fort Myers Villas, Clewiston, and Jupiter), and Alternative B, which provides only for an upgrade at Tice (in addition to Fort Myers Villas, Clewiston, and Jupiter) but avoids a downgrading of Station WWUS, Big Pine Key. WSUV's interest lies in obtaining a protected upgrade and avoiding the need to abandon its current channel to another area operator, while avoiding any need to change transmitter sites -- both of which remain possible upon adoption of either Alternative.

19. WSUV notes that the "Universal Changes" outlined in Paragraph 14 are self-contained, and do not require adoption of any of the changes proposed in Alternative A or Alternative B. Therefore, WSUV requests that the Commission sever the processing of the changes proposed as "Universal Changes" from those proposed in Alternative A or Alternative B.⁵

⁴ While the proposal to move Station WNOG, Naples, Florida, to Channel 284A was not included in the proposal formally placed on *Public Notice*, the proposal was placed on *Public Notice* previously (Notice of Proposed Rule Making and Order to Show Cause, DA 94-1501 (Dec. 27, 1994)), resulting in WNOG's filing dated February 16, 1995 ("Comments on Notice of Proposed Rulemaking and Opposition to Show Cause Order"). Consequently, WSUV does not believe that WNOG's rights are in any way prejudiced by the continued consideration of that proposal in this Docket. WNOG raised FAA concerns. However, a Determination of No Hazard was issued by the FAA for the proposal, the conditions contained in the Determination already have expired, and no new Notice to the FAA will be required for WNOG's proposed operation on Channel 284A.

For the reasons stated in the "Reply Comments" filed by Gulf Broadcasting Partnership on March 6, 1995, WNOG's concerns should, to the extent necessary, be rejected.

⁵ WSUV also is aware that WKKB, Key Colony Beach, is filing a request to sever from this proceeding to request expedited consideration of the proposed allotment of Channel 267C2 to Key Colony Beach and the proposal to modify its construction permit to that Channel. The permittee of WKKB has a construction permit for Channel 288C2, and already has been ordered to Channel 280C2 in another Docket, but since the permit's frequency may now be moved to

WHEREFORE, WSUV urges that the Commission sever Fort Myers Villas, Clewiston, and Jupiter from this Docket, and grant the "Universal Changes" indicated above, and modify the licenses of WJST, WAFC, and WJBW, respectively, to operate on the new channels.

Respectfully submitted,

WSUV, INC.

By: 

Dan J. Alpert

Its Attorney

The Law Office of Dan J. Alpert
2120 N. 21st Rd.
Suite 400
Arlington, VA 22201
(703) 243-8690

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Channel 267C2, the permittee has been reluctant to construct and commence operation until the final upgraded frequency on which it will operate is finally determined. WSUV supports WKKB's request so that that facility, which will provide first local service to that community, can promptly be built.

CERTIFICATE OF SERVICE

I hereby certify that the forgoing documents has been served to the following:

Jerold L. Jacobs, Esq.
Rosenman & Colin
1300 19th St.
Washington, DC 20036

Donald E. Ward, Esq.
Law offices of Donald E. War
1210 Pennsylvania Ave., N.W.
4th Floor
Washington, DC 20004

Richard M Riehl, Esq.
Haley, Bader & Potts
4350 North Fairfax Dr.
Suite 900
Arlington, VA 22203-1633

William D. Silva, Esq.
Law Offices of William D. Silva
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, DC 20015-2003

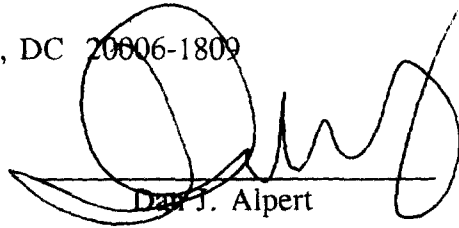
Mr. Robert Castellanos
Glades Media Company
116 Comercio St.
Clewiston, FL 22440

Mr. Howard Goldsmith
GGG Broadcasting, Inc.
6699 North Federal Highway
Suite 200
Boca Raton, FL 33487

Howard M. Weiss, Esq.
Fletcher, Heald & Hildreth
1300 North 17th St.
11th Floor
Rosslyn, VA 22209

Richard J. Bodorff, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, DC 20006

Nancy L. Wolf, Esq.
Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, DC 20006-1809



Dan J. Alpert